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AUTHOR Lehto, Neil J.
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ABSTRACT

The article examines the Landeros decision (which ruled that a doctor who fails to report a child abuse victim can be held liable for subsequent injuries inflicted on the child) and discusses three theories of proving civil liability for the failure to report child abuse victims. Addressed are the following topics: the problem of child abuse and reporting laws, the fact and issues of the Landeros v. Flood court case, medical malpractice for the failure to report child abuse, defining the statutory duty to report, statutory negligence for failing to report child abuse, liability per se for the violation of mandatory reporting laws, the proximate cause problem and reporting laws and due process. A widespread and continuing public and professional education and training program is suggested instead of approaches which involve toughening civil, criminal, or administrative penalties. (SBH)

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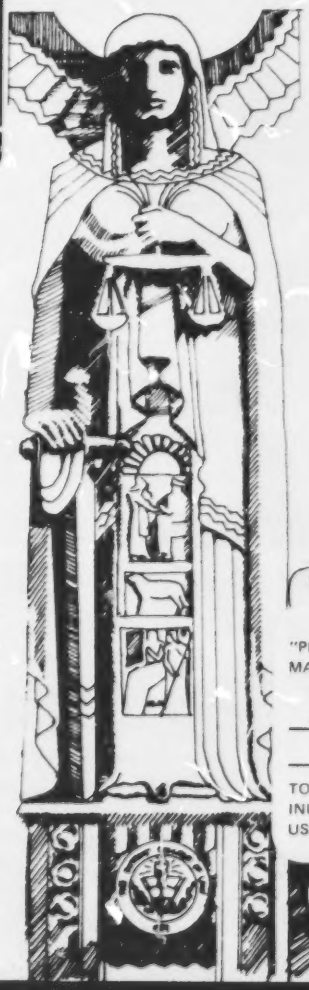

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CIVIL LIABILITY FOR FAILING TO REPORT CHILD ABUSE

INTRODUCTION

There was an old woman who lived in a shoe,
She had so many children that she didn't know what to do:
She gave them some broth without any bread.
She whipped them all soundly and put them to bed.[1]

In the history of the United States few legislative proposals have been so widely adopted in so little time as the mandatory reporting of abused children by physicians and others.[2] Between 1963 and 1965, all 50 states and Washington, D.C., enacted laws which require doctors and others to report suspected child abuse victims to legal and social welfare agencies so that appropriate protective measures can be taken.[3] While every state requires reporting of abused

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1. Mother Goose Nursery Rhyme

2. Paulsen, *The Legal Framework for Child Abuse Protection*, 66 COLUM. L. REV. 679, 711 (1966).

3. ALA. CODE tit. 27, §§ 21-25 (Supp. 1973); ALASKA STAT. §§ 47.17.010 to .17.070 (1975); ARIZ. REV. STAT. §§ 8-546.01 to 546.04, 13-842.0(A-F) (Supp. 1976); ARK. STAT. ANN. §§ 42-807 to -818 (Supp. 1975); CAL. PENAL CODE §§ 11160-11162 (West Supp. 1976); COLO. REV. STAT. §§ 19-10-101 to 10-115 (Supp. 1975); CONN. GEN. STAT. ANN. § 17-38a (West Supp. 1976); DEL. CODE tit. 16, §§ 901-908 (1975); D.C. CODE §§ 2-161 to 166 (1973); FLA. STAT. ANN. §§ 827.07(1)-.07(10) (West Supp. 1976); GA. CODE ANN. § 74-111 (Supp. 1976); HAWAII REV. STAT. §§ 350-1 to -5 (Supp. 1975); IDAHO CODE §§ 16-1601 to 1629 (1976); ILL. ANN. STAT. ch. 23, §§ 2051 to 2061 (Smith-Hurd Supp. 1976); IND. CODE ANN. §§ 12-3-4.1-1 to .1-6 (Burns 1971); IOWA CODE ANN. §§ 235A.1 - .24 (West Supp. 1976); KAN. STAT. §§ 38-716 to -724 (Supp. 1975); KY. REV. STAT. ANN. §§ 199.335, 199.990 (Baldwin Supp. 1976); LA. REV. STAT. § 14-403 (West Supp. 1976); ME. REV. STAT. tit. 22, §§ 3851-3857 (Supp. 1975); MD. ANN. CODE art. 27, § 35A(a) (1976); MASS. ANN. LAWS ch. 119, §§ 51A - G (Michie/Law Co-op Supp. 1976); MICH. COMP. LAWS ANN. §§ 722.621 - .636 (Supp. 1976); MINN. STAT. ANN. § 626.556 (West Supp. 1976); MISS. CODE ANN. § 43-21-11(d) (Supp. 1973); MO. ANN. STAT. §§ 210.110 - .165 (Vernon Supp. 1976); MONT. REV. CODES ANN. §§ 10-1300 to 1308 (Supp. 1975); NEB. REV. STAT. §§ 28-1501 to 1508 (1975); NEV. REV. STAT. §§ 200.501 - .507 (1975); N.H. REV. STAT. ANN. §§ 169:37 - :45 (Supp. 1975); N.J. STAT. ANN. §§ 9:6-8.8 to :6-8.20 (West Supp. 1976); N.M. STAT. ANN. § 13-14-14.1 (1976); N.Y. SOC. SER. LAW §§ 411-a to 420 (McKinney 1976); N.C. GEN. STAT. §§ 110-115 to 122 (Supp. 1975); N.D. CENT. CODE §§ 50-25.1-01 to -14 (Supp. 1975); OHIO REV. CODE ANN. §§ 2151.42.1, 2151.99(c) (Page Supp. 1976); OKLA. STAT. ANN. tit. 21, §§ 845 - 848 (West Supp. 1975); ORE. REV. STAT. §§ 418.740 -.775 (1975); PA. STAT. ANN. tit. 11, §§ 2201-12 (Purdon Supp. 1976); R.I. GEN. LAWS §§ 40-11-1.1 to 11 - 10 (Supp. 1975); S.C. CODE §§ 20-310 to 310.6 (Cum. Supp. 1976); S.D. COMP. LAWS ANN. §§ 26-10-10 to 10-15 (Supp. 1976); TENN. CODE ANN. §§ 37.1201 -1212 (Supp. 1975); TEXAS FAM. CODE ANN. tit. 2, §§ 34.01-.08, 35.04(c) (Vernon 1976 & Supp. 1976); UTAH CODE ANN. §§ 55-16-1 to 16-7 (Supp. 1975); VT. STAT. ANN. tit. 13, §§ 1351 to 1355 (Supp. 1976); VA. CODE §§ 63.1-248.2 to -248.6 (Supp. 1976); WASH. REV. CODE ANN. §§ 26.44.010-44.090 (Supp. 1975);

children by physicians and others, only 35 states impose any criminal penalty for the failure to comply.[4] However, in spite of this legislation, prosecution has been an empty threat. Despite violation by doctors and others every day,[5] no case of criminal prosecution can be found anywhere in the United States.[6]

In 1970, the father of an abused child in California filed a civil action[7] against four doctors and the city police department for their failure to report and adequately investigate his son's injuries under the state's mandatory reporting law.[8] Facts of the case are truly shocking.[9] The civil action was based on the theory of statutory

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W. VA. CODE §§ 49-6A-1 to 6A-4 (1974); WIS. STAT. ANN. § 48.981 (West Supp. 1975); WYO. STAT. §§ 14-28.7 to 28.13 (Supp. 1976). *See also* Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. §§ 5101-5106 (Supp. 1976); Child Abuse and Neglect Prevention and Treatment Project, 45 C.F.R. §§ 1340.1-1 to .3-8 (1976). For a comprehensive analysis of child abuse laws see V. DEFRANCIS & C. LUCHT, CHILD ABUSE LEGISLATION IN THE 1970's (rev. ed. 1974); Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103 (1974).

4. ALA. CODE tit. 27, § 25 (Supp. 1973); ARIZ. REV. STAT. § 13-842.01(E) (Supp. 1976); ARK. STAT. ANN. § 42-816(a) (Supp. 1975); CAL. PENAL CODE § 11162 (West Supp. 1976); COLO. REV. STAT. § 19-10-104(4)(a) (Supp. 1976); CONN. GEN. STAT. ANN. § 17-38a(c) (West Supp. 1976); DEL. CODE tit. 16, § 908 (1975); FLA. STAT. ANN. § 827.07(11) (1976); IND. CODE ANN. § 12-3-4.1-2(b) (Burns 1971); IOWA CODE ANN. § 235A.9(1) (West Supp. 1976); KAN. STAT. § 38-720 (Supp. 1975); KY. REV. STAT. ANN. § 199.990(7) (Baldwin Supp. 1976); LA. REV. STAT. § 14-403A(I) (West Supp. 1976); ME. REV. STAT. tit. 22, § 3857 (Supp. 1975); MINN. STAT. ANN. § 626.556(6) (West Supp. 1976); MO. ANN. STAT. § 210.165 (Vernon Supp. 1976); NEB. REV. STAT. § 28-1508 (1975); NEV. REV. STAT. § 200.507 (1975); N.H. REV. STAT. ANN. § 169:45 (Supp. 1975); N. J. STAT. ANN. § 9:6-8.14 (West 1976); N.M. STAT. ANN. § 13-14-14.1 (Supp. 1975); N.Y. SOC. SER. CODE § 420(1) (McKinney 1976); N.D. CENT. CODE § 50-25.1-13 (Supp. 1975); OHIO REV. CODE ANN. § 2151.99(c) (Page Supp. 1976). OKLA. STAT. ANN. tit. 21, § 848 (West Supp. 1975); PA. STAT. ANN. tit. 11, § 2212 (Purdon 1976); S.C. CODE § 20-310.5 (Supp. 1976); S.D. COMPILED LAWS ANN. § 26-10-13 (Supp. 1976); TENN. CODE ANN. § 37.1211 (Supp. 1975); TEX. FAM. CODE tit. 2, § 34.07 (Vernon 1976); UTAH CODE ANN. § 55-16-6 (Supp. 1975); VT. STAT. ANN. tit. 13, § 1353(d) (Supp. 1976); VA. CODE 63.1-248.6 (Supp. 1976); WASH. REV. CODE ANN. § 26.44.080 (Supp. 1975); and WIS. STAT. ANN. § 48.981(3) (Supp. 1975).

5. *See, e.g.*, N.Y. STATE ASSEMBLY, REPORT OF THE SELECT COMMITTEE ON CHILD ABUSE, 21-27 (1972).

6. Kohlman, *Malpractice Liability for Failing to Report Child Abuse*, 49 CALIF. S.B.J. 18, 121 (1974); Sussman, *Reporting Child Abuse*, 8 FAM. L. Q. 245, 296 (1973).

7. Robinson v. Wical, No. 70-37607 (Cal. Super. Ct. San Luis Obispo Cty., filed Sept. 4, 1970). For a discussion of the case by the plaintiff's attorneys, see Ramsey & Lawler, *The Battered Child Syndrome*, 1 PEPPERDINE L. REV. 372 (1974).

8. CAL. PENAL CODE § 11161.5 (West Supp. 1976).

9. Ramsey & Lawler, *supra* note 7, at 374-76: Five-month-old Tommy Robinson was a healthy, normal baby but early in 1970, his father left, and an AWOL soldier began living with his seventeen-year-old mother. On April 28, 1970, Tommy was taken to a hospital suffering from a skull fracture, contusions, blood blisters on his penis and many old bruises. The admitting doctor suspected child abuse but made no report to authorities as required by law. The boy was returned home to the mother a few days later. Twice during the next month, Tommy was returned to various hospitals for treatment of such injuries as bruised,

negligence,[10] but the case never was decided. Under terms of a settlement, which received nationwide publicity, the defendants agreed to pay the plaintiff more than $500,000.[11] The first civil action to enforce mandatory reporting laws had succeeded but without court review of the legal issues posed.

At the same time, prompted by a similarly shocking child abuse incident,[12] New York legislators added a specific civil liability clause to their reporting law.[13] They were soon followed by legislators in Iowa,[14] Arkansas,[15] Colorado[16] and Michigan,[17] which adopted the nation's most liberal civil liability provision.[18] More recently, the National Center for Child Abuse and Neglect of the U. S. Department of Health, Education and Welfare, issued a draft Model Child Protective Services Act, which includes a civil liability clause.[19] Thus far, none of these new statutory provisions have been tested by the appellate courts.[20]

However, on June 30, 1976, in the case of *Landeros v. Flood*,[21] the Supreme Court of California ruled that a doctor who fails to report a child abuse victim can be held liable for subsequent injuries inflicted upon the child by his parents on a theory of medical malpractice. One of the winning attorneys proclaimed:

> The decision represents a complete victory and is the first appellate decision of its kind in the country. It mandates health care providers to comply with child abuse reporting statutes and imposes civil liability for damages

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swollen arms, neck wounds and welts on his back. The third time he was admitted to the hospital on May 27, 1970, he had strangulation marks on his neck and he was not breathing. Before respiration could be restored, the boy suffered severe and permanent brain damage. His father brought suit against the four doctors for failing to report the attacks, and against the city police department for failing to investigate adequately. The case was settled on the third day of trial when the court told the defendants it was going to direct a verdict for plaintiffs, leaving to the jury only the amount of damages.

10. *See* notes 157-67 & accompanying text *infra*.
11. TIME, Nov. 20, 1972, at 74; L.A. Times, Oct. 28, 1972, at 1, col 6-8.
12. *See* REPORT, *supra* note 5, at ii.
13. N.Y. SOC. SERV. LAW § 420(2) (McKinney 1976).
14. IOWA CODE ANN. § 235A.9(2) (West Supp. 1976).
15. ARK. STAT. ANN. § 42-816(b) (Supp. 1975).
16. COLO. REV. STAT. § 19-10-104(4)(b) (Supp. 1975).
17. MICH. COMP. LAWS ANN. § 722.633(1) (Supp. 1976).
18. *See* notes 168-170 & accompanying text *infra*.
19. U. S. Dep't of H.E.W., Nat'l Center Child Abuse & Neglect, *Model Child Protective Services Act With Commentary*, tit. 2, § 12 (1976).
20. A civil action by a 14-year-old boy against Chemung County, New York, for failing to comply with the reporting law, is pending. Leach v. Chemung Cty., No. 75-2652 (Chemung Cty. Sup. Ct. N.Y., filed May 18, 1976).
21. 17 Cal. 3d 399, 131 Cal. Rptr. 69, 551 P.2d 389 (1976).

> for failing to do so. This decision will have the prophylactic and salutory effect the reporting statutes failed to achieve. It represents a victory not only for our young client, but for battered children everywhere [*sic*].[22]

A more dispassionate analysis of the case would conclude that the decision represents a major, but not complete victory for battered children in the 50 states and Washington, D.C. Certainly, however, impact of the case is nationwide. This comment will examine the *Landeros* decision and discuss the three theories of proving civil liability for the failure to report child abuse victims—medical malpractice, statutory negligence and liability per se.[23]

I. The Problem of Child Abuse and Reporting Laws

A. Background

Every year in the United States an estimated 10,000 or more children are assaulted by their parents.[24] Some are killed and others suffer tragic permanent injuries. Many thousands more are whipped, beaten, scalded or burned enough to require medical attenton.[25] In 1962, Dr. Henry K. Kempe and a team of medical researchers from the University of Colorado Medical School published a landmark article on what they called the "battered child syndrome."[26] The article described a medical diagnosis and treatment for the condition. They said the major diagnostic feature of the battered child syndrome is an unexplained, non-accidental injury. Proper treatment, they said, requires not only treating the symptomatic injuries but also treating the underlying cause of those injuries—assault or neglect by the child's parents. They concluded that proper medical management requires the reporting of abused children to the local police and juvenile agencies for follow-up investigation and protective custody for the child in appropriate cases.[27] "All too often," they said, "the child is returned to his home only to be assaulted again and suffer permanent brain damage or death."[28]

Concern for the plight of abused children spread across the coun-

22. Letter from Richard J. Kohlman, Memo To All Friends and Interested Persons, July 2, 1976, on file with Det. Coll. L. Rev.

23. Civil liability based on a specific statutory civil liability provision is liability per se.

24. V. DeFrancis & C. Lucht, *supra* note 3, at 1.

25. Kempe, *The Battered Child & the Hospital*, Hospital Practice, Oct. 1969, at 44.

26. Kempe, Silverman, Steele, Droegermueller & Silver, *The Battered Child Syndrome*, 181 J.A.M.A. 24 (1962).

27. *Id.* at 24.

28. *Id.*

try at an unprecedented rate soon after publication of the article. Model legislation was prepared[29] and by 1965 all 50 states and Washington, D.C., had adopted mandatory child abuse reporting laws.[30] But these mandatory laws were not enforced[31] and doctors continued to return abused children to their parents without reporting their suspicions to authorities as required by these new laws.[32] In 1967, a Yale Law School expert on child abuse reporting laws, Monrad G. Paulsen, suggested that a doctor who fails to report an abused child as required by law could be held liable for subsequent injuries to the child.[33] His theory received some attention over the next few years as a means for enforcing child abuse laws[34] but never reached the courts for decision until the *Landeros* case was brought in California.

B. Criminal Liability For The Failure To Report

State laws impose criminal liability for the failure to report in a great many more situations than just child abuse.[35] Most of these laws, too, are rarely enforced.[36] Legislators probably did not foresee

29. Thomas, *Child Abuse & Neglect*, 50 N.C.L. REV. 293, 331-32 (1972).

30. Paulsen, *supra* note 2.

31. *See* notes 5, 6 *supra*.

32. *Id.*

33. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 34-36 (1967).

34. Bard, *Connecticut's Child Abuse Law*, 48 CONN. B.J. 260, 269 (1974); Brown, *Child Abuse: Attempt to Solve the Problem by Reporting Laws*, 60 WOMAN LAWYERS J. 73 (1974); Fraser, *supra* note 3, at 115; Isaacson, *Holding Physicians Civilly Liable for Failing to Report*, 12 SAN DIEGO L. REV. 743 (1975); Ramsey & Lawler, *supra* note 7; Note, 50 CHI-KENT L. REV. 63 (1973). Note, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 364 (1971).

35. Michigan, for example, requires physicians to report cases of smallpox, cholera, diphtheria, scarlet fever or any other disease dangerous to the public health, MICH. COMP. LAWS ANN. § 327.44 (1968); also tuberculosis, MICH. COMP. LAWS ANN. § 329.401 (1968); venereal disease, MICH. COMP. LAWS ANN. § 329.154 (1968); occupational diseases, MICH. COMP. LAWS ANN. § 419.1 (1968); lead poisoning in minors, MICH. COMP. LAWS ANN. § 722.591 (Supp. 1976); phenylketonuria tests of infants, MICH. COMP. LAWS ANN. § 325.521 (1968); silver nitrate treatment of infant's eyes, MICH. COMP. LAWS ANN. § 750.472 (1968), drug addicts, MICH. COMP. LAWS ANN. § 335.204 (1968); syphilis blood test for pregnant woman, MICH. COMP. LAWS ANN. § 329.153 (1968). For a general sampling of similiar state and federal laws see Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367, 402-05 (1972). *See generally* Hughes, *Criminal Omissions*, 67 YALE L.J., 590 (1958); Snyder, *Liability for Negative Conduct*, 35 VA. L. REV. 446 (1949). For an interesting philosophical overview see Dession, *The Technique of Public Order: Evolving Concepts of Criminal Law*, 5 BUFFALO L. REV. 22 (1955).

36. Isaacson, *supra* note 34, at 758-59: "Looking to the case law, there is a startling dearth of reported decisions which deal with a doctor's negligent noncompliance with a reporting statute." The foregoing list of Michigan reporting laws in note 35, *supra*, has produced only

actual criminal prosecutions for violation of these reporting laws,[37] but included criminal penalties to provide a deterrent[38] and to forestall misguided public criticism that mandatory laws are useless without enforcement mechanisms.[39] However, as a practical matter, finding and proving a violation of reporting laws is very difficult, if not impossible.[40] Moreover, there is a general reluctance among prosecutors in bringing criminal action in such cases for both administrative and political reasons.[41]

Chief Justice Marshall said in *Marbury v. Brooks*,[42] "It may be the duty of a citizen to accuse every offender and to proclaim every offense which comes to his knowledge; but the law which would punish in every case is too harsh for man."[43] This argument may have application to enforcement of child abuse reporting laws by criminal prosecution. For example, misprison of a felony bears striking resemblance to the crime of failing to report a child abuse victim. Both offenses involve a failure to inform authorities so that a crime may be prevented or a culprit caught.[44] It becomes more difficult to draw any hard distinctions between the two offenses because most state laws make the perpetrators of child abuse guilty of a felony.[45] Some state and federal court decisions interpreting misprison of a felony have required a showing of affirmative concealment,[46]

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five cases on appeal: People v. Clobridge, 249 Mich. 376, 228 N.W. 692 (1930); Janssen v. Mulder, 232 Mich. 183, 205 N.W. 159 (1925); People v. Wohlford, 226 Mich. 166, 197 N.W. 558 (1924); People v. Shurly, 124 Mich. 645, 83 N.W. 595 (1900); People v. Brady, 90 Mich. 459, 51 N.W. 537 (1892). For an interesting discussion of the nonenforcement of criminal statutes see Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389 (1964).

37. REPORT, *supra* note 5, at 40: "Although this Committee *would prefer to rely upon education and voluntary compliance*, we are convinced that those who refuse to fufill their duty must be penalized." (emphasis added).

38. Sussman, *supra* note 6, at 295, 296. *See also* Daly, *Willful Child Abuse and State Reporting Statutes*, 23 U. MIAMI L. REV. 283, 336, 337 (1969); McCoid, *The Battered Child and Other Assaults Upon the Family*, 50 MINN. L. REV. 1, 43 (1965).

39. Shepherd, *The Abused Child & The Law*, 22 WASH. & LEE L. REV. 182, 192 (1965). *See also* Sussman, *supra* note 6, at 295, 296. See notes 220-22 & accompanying text *infra*.

40. Shepherd, *supra* note 39, at 192.

41. Fraser, *supra* note 3, at 115.

42. 20 U.S. (7 Wheat.) 556 (1822).

43. *Id.* at 575-76.

44. Frankel, *supra* note 35, at 419. *Model Act*, *supra* note 19, at 2: "Abused and neglected children in this state urgently need protection. It is the purpose of this act to help save them from further injury and harm. . . ."

45. *See, e.g.*, CAL. PENAL CODE § 273a(1) (West 1970); MICH. COMP. LAWS ANN. § 750.136 (1968).

46. Frankel, *supra* note 35, at 417.

some have narrowly defined or limited the offense,[47] and some have actually denied its existence.[48] The Supreme Court of Michigan refused to recognize the offense, saying that it is "wholly unsuited to American criminal law and procedure. . . ."[49] State courts could approach child abuse reporting laws with the same attitude.

C. Civil Liability For The Failure To Report

It is important to note that statutes which make mandatory the reporting of child abuse cases impose on physicians and others an affirmative duty, the breach of which requires not an act, but an omission. Civil liability for an omission is contrary to the common law.[50] In recent years, however, court decisions and legislation have abandoned this historical doctrine, rooted in fundamental concepts of personal freedom and public order.[51] Liability for the failure to act has been extended where there is some definite relationship between the parties "of such a character that social policy justifies the imposition of a duty to act."[52]

Few cases can be found imposing civil liability for the failure to report. Some courts have recognized a common law duty to report by physicians and others in very limited situations.[53] These cases all involved the failure to report a foreseeable danger to the patient or a third party arising from the patient's condition or illness.[54] Another group of cases has firmly established the liability of physicians and others for the failure to report a clearly recognized and diag-

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47. *Id.*

48. *Id.*

49. People v. Lefkovitz, 294 Mich. 263, 270, 293 N.W. 642, 643 (1940).

50. *See generally*, F. HARPER & F. JAMES, THE LAW OF TORTS, § 18.6 (1956); Isaacson, *supra* note 34, at 765-67 (1975); McNeice & Thorton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1282 (1949); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Thayer, *Public Wrong & Private Action*, 27 HARV. L. REV. 317 (1914); Notes, *Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 632 (1952).

51. Notes, *Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. at 632:

> Judicial reluctance to require positive action was a concomitant of the individualistic premises inherent in the common law; not only was a person considered capable of taking care of himself, but the imposition of criminal or civil liability for the purpose of encouraging beneficial action or redistributing loss seemed an unwarranted limitation on personal freedom.

52. PROSSER, TORTS 339 (4th ed. 1971).

53. Merchants Nat'l Bank v. U.S., 272 F. Supp. 409 (D.N.D. 1967); Tarasoff v. Regents of U. Calif., 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976); Freese v. Lemmon, 210 N.W.2d 576 (Iowa 1973); Kaiser v. Suburban Trans. Systems, 65 Wash. 2d 461, 398 P.2d 14 (1965).

54. Hirsh, *Malpractice Liability of Physicians to Third Parties*, 81 CASE & COMMENT 44 (1976).

nosed contagious disease posing a known danger to others.[55] While some of these cases were based upon violation of a state disease reporting law,[56] the duty of warning the patient or third party was not strictly attached to violation of the reporting law.[57]

Applicability of these cases to child abuse reporting situations is doubtful for two reasons.[58] First, the abused child's condition does not necessarily suggest danger.[59] There can be no question about the danger of scarlet fever,[60] smallpox,[61] or tuberculosis.[62] Second, none of these cases was troubled by the third-party criminal conduct that arises when liability is sought for the failure to report child abuse.[63]

II. Landeros v. Flood

A. The Facts

On April 26, 1971, the plaintiff, Gita Landeros, was taken by her

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55. Davis v. Rodman, 147 Ark. 385, 227 S.W. 612 (1921); Piper v. Menifee, 51 Ky. (12 B. Mon.) 465 (1851); Medlin v. Bloom, 230 Mass. 201, 119 N.E. 773 (1918); Skillings v. Allen, 143 Minn. 323, 173 N.W. 663 (1919); Span v. Ely, 15 N.Y. (8 Hun.) 225 (1876); Edwards v. Lamb, 69 N.H. 599, 45 A. 480 (1899); Jones v. Stanko, 118 Ohio 147, 160 N.E. 456 (1928); Hofmann v. Blackmon, 241 So. 2d 752 (D.C. Fla. 1970); Dietsch v. Mayberry, 70 Ohio App. 527, 47 N.E.2d 404 (1942); Wojcik v. Alum. Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (Sup. Ct. Erie Cty. 1959).

There is one Michigan case, Janssen v. Mulder, 232 Mich. 183, 205 N.W. 159 (1925), which was brought under the statutory requirement that physicians report diptheria cases to public health officials. Mich. Comp. Laws Ann. § 327.44 (1968). The defendant, a chiropractor, failed to recognize the disease. The court found a duty to use reasonable care to diagnose diseases under the reporting statute and upheld a malpractice judgement. *See also* Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920); Hewett v. Woman's Hospital Aid Ass'n, 73 N.H. 556, 64 A. 190 (1906).

56. Davis v. Rodman, 147 Ark. 385, 227 S.W. 612, (board of health regulation requiring reports of communicable disease); Medlin v. Bloom, 230 Mass. 201, 119 N.E. 773, (statute requiring report of eye disease in infants); Skillings v. Allen, 143 Minn. 323, 173 N.W. 663 (board of health regulation requiring reports of infectious diseases); Jones v. Stanko, 118 Ohio 147, 160 N.E. 456, (statute requiring reports of contagious disease); Wojcik v. Alum. Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351, (board of health regulation requiring report of tuberculosis); Dietsch v. Mayberry, 70 Ohio App. 527, 47 N.E.2d 404, (statute requiring reports of eye disease in infants).

57. *See, e.g.*, Skilling v. Allen, 143 Minn. 323, 173 N.W. 663.

58. *See* Landeros v. Flood, 123 Cal. Rptr. 213, 720 (1975).

59. Note, *The Battered Child*, *supra* note 34, at 365 n.2:

> Identification of the abused child is tempered by awareness of the fact that children may suffer physical mars, brusies and scratches due neither to parental neglect nor intent, and at any one time may coincidentally show a variety of physical marks . . . even though their parents may be loving, concerned, and reasonably careful.

60. Skillings v. Allen, 143 Minn. 323, 173 N.W. 663.

61. Jones v. Stanko, 118 Ohio 147, 160 N.E. 456.

62. Wojcik v. Alum. Co. of America, 18 Misc. 2d 740, 183 N.Y.S.2d 351; Hofmann v. Blackmon, 241 So. 2d 752.

63. *See* notes 184-95 & accompanying text *infra*.

mother to the defendants, Dr. A. J. Flood, and the San Jose Hospitals and Health Center, Inc., for treatment of a broken leg. Gita also was suffering with numerous bruises and cuts, and a slight skull fracture. Her mother provided no explanation for the injuries. After treatment, Gita was returned to her parents.[64] No report of her injuries was made to state authorities. On July 1, 1971, Gita was beaten, bitten and burned by her parents. Subsequently, this action was filed, alleging that the failure to diagnose and report her symptoms of the battered child syndrome was a direct and proximate cause of her injuries. The complaint alleged four separate causes of action: medical malpractice and statutory negligence by the doctor, statutory negligence by the hospital and a fourth cause of action seeking punitive damages. The trial court sustained demurrers by the defendants to all four causes of action.[65] The California District Court of Appeal upheld the dismissal of the malpractice causes of action but reversed with directions to overrule the demurrers to statutory negligence causes of action against both Dr. Flood and the San Jose Hospital.[66] The California supreme court reversed, upholding both the malpractice and statutory negligence causes of action against both defendants.[67]

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64. 123 Cal. Rptr. at 717 n.2:

> In actual fact the child was living with her mother and with the latter's common law husband. The record is silent as to the child's natural father. For purposes of clarity we shall refer to plaintiff's mother and the latter's common law husband as plaintiff's parents.

For a more complete description of the facts see Opening Brief for Appellant at 5-10, Landeros v. Flood, 123 Cal. Rptr. 713 (1975). It is important to remember that the court of appeal and the supreme court received this case on demurrer. In California:

> [A] general demurrer admits the truth of all material allegations in the complaint . . . that the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court . . . and that plaintiff need only plead facts showing that he may be entitled to some relief.

Alcorn v. Ambro Eng'r, 2 Cal. 3d 493, 494, 86 Cal. Rptr. 88, 89, 468 P.2d 216, 217 (1948). The demurrer is similar to a summary judgement pleading in Michigan under MICH. GEN. CT. R. 117(2)(1) that the plaintiff has failed to state facts sufficient to show a cause of action against the defendant.

65. Landeros v. Flood, No. 33,141 (Cal. Sup. Ct. Santa Clara Cty., filed Jan. 2, 1973). Opening Brief for Appellant at 9 n.22:

> The fourth cause of action requesting punitive damages has been abandoned [on appeal]. While we feel Gita's case was badly mismanaged by the defendants, there is no evidence of express or implied malice towards her. Historically, moreover, awards of punitive damages are rarely if ever allowed to stand in Santa Clara County.

66. 123 Cal. Rptr. 713.

67. 17 Cal. 3d 399, 131 Cal. Rptr. 69, 551 P.2d 389 (1976).

B. The Issues

The California supreme court was faced with two difficult issues in *Landeros* and avoided both of them by ruling that they presented questions of fact for the judge and jury to decide from the testimony at trial. The first issue was whether the standard of care required of physicians includes properly diagnosing and treating the battered child syndrome. The court concluded that "neither this nor any other court possesses the specialized knowledge necessary to resolve the issue as a matter of law."[68] The second issue was whether the intervening criminal assault by the child's parents was reasonably foreseeable by an ordinarily prudent physician. The court reasoned that issues of proximate cause and foreseeability are usually questions of fact for the trial court.[69] "We cannot say categorically that an ordinarily prudent physician. . . would not have foreseen the likelihood of further serious injuries. . . ."[70] This was a crushing blow to the defendants, who relied heavily on the argument that intervening criminal acts are unforeseeable as a matter of law.[71]

The California Supreme Court decision obscured the precise dividing line drawn between the plaintiff's malpractice and statutory negligence causes of action in two ways. First, the supreme court foreclosed any testimony by the defendants that the common law standard of care required of physicians does not include diagnosing and reporting battered children.[72] The court said the state's mandatory reporting law precludes such testimony.[73] Second, the supreme court cautiously avoided a direct ruling on the plaintiff's statutory negligence causes of action, holding instead that the "purpose of that theory is manifestly to raise a presumption that by omitting to report plaintiff's injuries to the authorities as required by law, de-

68. *Id.* at 410, 131 Cal. Rptr. at 74, 551 P.2d at 394.

69. *Id.* at 411, 131 Cal. Rptr. at 75, 551 P.2d at 395.

70. *Id.* at 412, 131 Cal. Rptr. at 75, 551 P.2d at 395.

71. *See generally* Brief for Respondent A.J. Flood, Reply Brief for Respondent The San Jose Hospitals and Health Center, Inc., Landeros v. Flood, 123 Cal. Rptr. 713.

72. 17 Cal. 3d at 410 n.8, 131 Cal. Rptr. at 74 n.8, 551 P.2d at 394 n.8:

> Whether the physician would have followed the procedure of reporting plaintiff's injuries to the authorities, however, is not solely a question of good medical practice. The above cited statutes. . .were in force in 1971. They evidence a determination by the Legislature that in the event a physician does diagnose a battered child syndrome, due care includes a duty to report that fact to the authorities. In other words, since the enactment of these statutes a physician who diagnoses a battered child syndrome will not be heard to say that other members of his profession would not have made such a report. . . .

73. *Id. See* Kohlman, *supra* note 6, at 122-23.

fendants failed to exercise due care. . . ."[74] Clearly, the plaintiff in *Landeros* was alleging separate theories of liability, not separate theories of finding a breach of due care.[75] This distinction was recognized by the court of appeals.[76] Requirements of a general negligence action based on violation of a statute[77] are much simpler than requirements of a medical malpractice action.[78] Here, the supreme court may simply have been avoiding an unnecessary decision. By recognizing a separate statutory cause of action for the failure to report, the court would impose potential liability, not only on physicians, but on teachers, social workers and others, who likewise are required by law to report abuse.[79] The court's handling of the statutory negligence avoided that immediate possibility. However, there are indications in the supreme court opinion that future appeals by teachers, social workers and others will not receive a sympathetic hearing.[80]

III. Medical Malpractice for the Failure to Report Child Abuse

A. The Common Law Duty to Diagnose

The requirements of a cause of action for medical malpractice are firmly established.[81] A malpractice action for the failure to report child abuse must prove both the existence of the symptoms of child abuse and a duty to properly diagnose those symptoms.[82] Abused children may be divided into two groups—traumatic injuries and subtle injuries. It may be proved by expert medical testimony that

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74. 17 Cal. 3d at 413, 131 Cal. Rptr. at 76, 551 P.2d at 396.

75. Opening Brief for Appellant at 27:

> Gita's case not only concerns the California Child Abuse Reporting Statute, but it invokes the protection of two other reporting statutes as well. However, she also makes claim against the doctor and the hospital on what might be called a general common law medical negligence or malpractice basis. All three theories of recovery are separately pleaded and independently involved in this appeal.

76. 123 Cal. Rptr. at 720.

77. Kohlman, *supra* note 6, at 123, 184. *See* notes 157-67 & accompanying text *infra*.

78. Kohlman, *supra* note 6, at 122, 123. *See* notes 81-103 & accompanying text *infra*.

79. Cal. Penal Code § 11161.5 (West Supp. 1976).

80. 17 Cal. 3d at 410 n.8, 131 Cal. Rptr. at 74 n.8, 551 P.2d at 394 n.8.

81. *See generally* Prosser, *supra* note 52, at 143; McCoid, *The Care Required of Medical Practioners*, 12 Vand. L. Rev. 549 (1959). *See also* Mich. Comp. Laws Ann. § 600.2912 (1970); Mich. Comp. Laws Ann. § 600.5805(3) (1968).

82. Either the physician failed to recognize symptoms of child abuse or, if he did recognize the symptoms, he failed to report its existence to proper authorities as required by proper medical procedures or the mandatory child abuse reporting law. *Cf.* Janssen v. Mulder, 232 Mich. 183, 205 N.W. 159 (1925).

the reasonably prudent physician would recognize symptoms of the battered child syndrome, starvation, knife or gunshot wound, sexual assault and similarly abused children.[83] Each of these presents clearly recognized symptoms which could be the result of parental assault or malicious neglect readily detectable by a trained physician.[84] Moreover, six cases have recognized the medical diagnosis of the battered child syndrome.[85] These cases held admissible the testimony of a doctor that a child was the victim of the battered child syndrome in a criminal prosecution of his parents for child abuse or manslaughter. The California court of appeal ruled in the case of *People v. Jackson*[86] that "the diagnosis of the 'battered child syndrome' has become an *accepted medical diagnosis.*"[87]

It may be more difficult to prove by expert medical testimony that a reasonably prudent physician would recognize symptoms of parental abuse or neglect in a simple assault, maltreatment or neglect of medical, nutritional and other needs.[88] The California court of appeal in *Landeros* recognized this distinction but seems to have overlooked the basic definitional problem: "[T]he very legal, medical and sociological articles and essays referred to. . .indicate that the clinical condition designated as the battered child syndrome is far from being well-defined or clear-cut. Rather, it includes a vast array of phenomena. . . ."[89] Much to the contrary, the battered child syndrome is well-defined and clear-cut[90] although some legal, medical and sociological articles have tended to muddle the definition by using the battered child syndrome and child abuse synonomously. More likely, the *Landeros* court was troubled by the *Jackson* holding and chose to confuse the situation itself as a way

83. 17 Cal. 3d at 410, 131 Cal. Rptr. at 74, 551 P.2d at 394.

84. The duty to diagnose involves not the proper recognition of a hammer blow to the arm, for example, but concluding, therefrom, that a parent of the child may have swung the hammer.

85. Minnesota v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973); *In Re* J.Z., 190 N.W.2d 27 (N.D. 1971); People v. Henson, 342 N.Y.S.2d 1007, 304 N.E.2d 358 (1973); People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971); James v. Maryland, 5 Md. App. 647, 248 A.2d 910 (1969); People v. Barnwell, 60 Mich. App. 291, 230 N.W.2d 400 (1975). *See also In Re* S., 46 Misc. 2d 161, 259 N.Y.S.2d 164 (1965).

86. 18 Cal. App. 3d 504, 95 Cal. Rptr. 919.

87. *Id.* at 507, 95 Cal. Rptr. at 921 (emphasis added).

88. *See* note 59 & accompanying text *supra*.

89. 123 Cal. Rptr. at 718.

90. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1516 (25th ed. 1974): "Multiple traumatic lesions of the bones and soft tissue of young children, often accompanied by subdural hematomas; such lesions are usually willfully inflicted by an adult."

of avoiding the impact of the case.[91]

The court of appeal looked at the allegations in *Landeros* and ruled as a matter of law that there was no legal duty to properly diagnose the battered child syndrome.[92] The holding was chastized by the supreme court: "[N]either this nor any other court possesses the specialized knowledge necessary to resolve the issue as a matter of law. . . .The question remains one of fact, to be decided on the basis of expert testimony. . . ."[93]

B. The Duty To Report

The plaintiff in a medical malpractice action also must prove a duty to report child abuse because the failure to report provides the proximate cause link between the defendant's negligence and the plaintiff's subsequent injuries.[94] Two methods are available to the plaintiff's attorney. He could attempt to show by expert medical testimony that the reasonably prudent physician routinely reports victims of child abuse that come to his attention;[95] or he could attempt to raise a presumption of negligence by showing that the defendant violated a mandatory child abuse reporting law.[96]

1. *The Common Law Duty To Report*

The court of appeal in *Landeros* was unimpressed with the plaintiff's argument that a common law duty to report exists: "[T]he doctor's duty to report may be only a moral, but not a legal,

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91. 123 Cal. Rptr. at 718. *See also* Petition For Hearing in the Supreme Court at 10-11, Landeros v. Flood, 17 Cal. 3d 399, 131 Cal. Rptr. 69, 551 P.2d 389.

92. 123 Cal. Rptr. at 719.

93. 17 Cal. 3d at 410, 131 Cal. Rptr. at 74, 551 P.2d at 394.

94. 123 Cal. Rptr. at 719-20.

95. 17 Cal. 3d at 413, 131 Cal. Rptr. at 76, 551 P.2d at 396. *See also* Kohlman, *supra* note 6, at 123:

> [R]eliance should not be placed entirely on the reporting statute. An attempt should be made to establish the standard of care independently, in order to guarantee the availability of insurance coverage. Malpractice insurance usually does not cover liability for willful misconduct. . . .[A] forty-year-old Court of Appeal case upholding denial of liability insurance coverage for a plaintiff's judgement based on violation of a statute still stands [citations omitted].

See CAL. INS. CODE § 533 (West 1972); Glesby v. Hartford Accident & Indemnity, 6 Cal. App. 2d 89, 44 P.2d 365 (1935). Michigan courts take the opposing view. State Farm Mut. Auto Ins. v. Coon, 46 Mich. App. 503, 208 N.W.2d 532 (1973). *Quaere*, whether Michigan's new medical malpractice arbitration law would apply in this kind of case because of the parent's adverse interests. *See* MICH. COMP. LAWS ANN. § 600.5046(2) (Supp. 1976); Reliance Ins. v. Haney, 54 Mich. App. 237, 220 N.W.2d 728 (1974).

96. 17 Cal. 3d 413-14, 131 Cal. Rptr. at 76-77, 551 P.2d 396-97.

duty. . . ."[97] According to the appeal court, a common law duty to report would fall into the same category as a common law duty to warn or rescue.[98] A common law duty to warn or rescue is an affirmative duty imposed on an actor in situations where there is some special relationship between the parties.[99] Here, despite an emotional argument that it is inexcusable for the doctor to fail to report under circumstances where that simple action would be effective, easy and commanded by every social and moral consideration, neither the court of appeal nor the supreme court would recognize such a duty.

Arguments against the courts' reluctance to recognize a duty a report are persuasive. An abused child is in helpless peril. Ordinarily, the child is physically and emotionally powerless to defend himself against his parents, and his safety is always in danger as battering occurs regularly and repeatedly. This fact is universally recognized by legal, medical and sociological scholars who have studied the battered child syndrome.[100]

The very basis of medical malpractice is the patient-physician relationship.[101] The duty of care owed by the doctor to his patient arises out of that relationship. Courts have recognized a duty to aid one in peril in the relationship of a carrier and passenger, employer and employee, shopkeeper and business visitor, host and social guest, jailer and prisoner, school and pupil, husband and wife, parent and child.[102] It cannot reasonably be argued that the patient-physician relationship is not sufficient to give rise to an affirmative duty to warn, rescue or report. Finally, the filing of a child abuse report presents no peril to the physician. Statutes enacted in 49

97. 123 Cal. Rptr. at 720. *See also* Paulsen, *supra* note 33, at 35.

98. 123 Cal. Rptr. at 720.

99. *See* note 50 *supra*. *See also* Allen v. Hixson, 111 Ga. 460, 36 S.E. 810 (1900); Union Pac. Ry. Co. v. Cappier, 66 Kan. 649, 72 P. 281 (1903); L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942); Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1903). For an enlightening discussion applicable to this subject see Freese v. Lemmon, 210 N.W.2d at 583 (LeGrand, J., dissenting):

> The public policy considerations inherent in this [special-relation and benefit] rule under any circumstances becomes of overriding importance when applied to medical practioners. It is impossible to resolve this issue without taking into account the crisis which confronts us as to both the availability and cost of adequate health care [citations omitted].

100. *See, e.g.*, Grummet, *The Plaintive Plaintiffs: Victims of the Battered Child Syndrome*, 4 FAM. L.Q. 296, 303, 304 (1970); Paulsen, *supra* note 33, at 3; Closing Brief of Appellant at 10-15, Landeros v. Flood, 123 Cal. Rptr. 713.

101. Rogers v. Horvath, 65 Mich. App. 644, 237 N.W.2d 595 (1975).

102. PROSSER, *supra* note 52, at 341, 342.

states and Washington, D.C., provide immunity from civil or criminal liability arising from the report.[103] Any balancing test should conclude that a common law duty to report exists.

2. *The Statutory Duty To Report*

Mandatory reporting laws exist in every state and a plaintiff could expect courts to react much more favorably to an alleged medical malpractice situation based on the statutory duty to report. There is general agreement on the requirements for the application of a statutory duty in a civil action such as medical malpractice. If the plaintiff is one of the class of persons which a criminal statute was intended to protect, and if the harm suffered was of the sort which the statute was intended to protect against, the courts may adopt the statutory duty in a civil action.[104]

In most states, violation of a criminal statute is negligence per se.[105] In still other states, violation of a criminal law raises a presumption of negligence which may be rebutted.[106] In a few states, criminal conduct is only evidence of negligence.[107] While the general rules are quite clear, application of them by the courts is confusing because of the controlling influence of public policy in the courts' decisions whether to apply them in a particular case.[108] This much can be said with certainty. In the five states which specifically provide civil liability for the failure to report child abuse, the courts must apply the legislative standard of care.[109] In the 31 states which

103. S. KATZ, M. MCGRATH, R. HOWE, CHILD NEGLECT LAWS IN AMERICA, 65 (A.B.A. 1976): "[A]ll jurisdictions except Oregon have provided some type of immunity for reporters." In Oregon, a reporter enjoys protection of the common law privileged communications rule. *See* PROSSER, *supra* note 52, at 785-92.

104. RESTATEMENT (SECOND) OF TORTS § 286 (1965); CAL. EVID. CODE § 669 (West Supp. 1976). *See also* Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916); O. HOLMES, THE COMMON LAW, 120-29 (1881).

105. Hardaway v. Consol. Paper Co., 366 Mich. 190, 114 N.W.2d 236 (1962); PROSSER, *supra* note 52, at 200: "Once the statute is determined to be applicable. . .the great majority of the courts hold that an unexcused violation is *conclusive* on the issue of negligence, and that the court must so direct the jury." (emphasis added). Syneszewski v. Schmidt, 153 Mich. 438, 116 N.W. 1107 (1908).

106. PROSSER, *supra* note 52, at 201: "[T]he violation creates a presumption of negligence, which may be rebutted by a showing of an adequate excuse but calls for a binding instruction in the absence of such evidence."

107. *Id.*: "A considerable minority have held that a violation is only evidence of negligence, which the jury may accept or reject as it sees fit."

108. *See generally* RESTATEMENT (SECOND) OF TORTS § 286, comment d.

109. RESTATEMENT (SECOND) OF TORTS § 286, comment c. ARK. STAT. ANN. § 42-816(b) (Supp. 1975); COLO. REV. STAT. § 19-10-104(4)(b) (Supp. 1975); IOWA CODE ANN. § 235A.9(2)

impose only criminal liability, the decision whether to adopt the legislative standard is purely a court judgment, based on public policy and legislative intent.[110] In the 14 states which impose neither, the courts are likely to reject application of the legislative standard of care to impose civil liability.[111]

There can be no question that mandatory child abuse reporting laws were enacted for the protection of children and that the harm an abused child suffers is the harm reporting laws were enacted to prevent.[112] Therefore, the only real questions in applying the statutory duty to report in a medical malpractice case are any public policy and legal arguments against imposing civil liability in these circumstances. The basic public policy question is whether child abuse reporting laws provide any significant protection to children which the courts ought to recognize by imposing civil liability for their violation.

a. The Public Policy Question

Reporting is the first step in dealing with the problem of child

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(West Supp. 1976); MICH. COMP. LAWS ANN. § 722.633(1) (Supp. 1976); N.Y. SOC. SERV. LAW. § 420(2) (McKinney 1976).

110. RESTATEMENT (SECOND) OF TORTS § 286, comment d. ALA. CODE tit. 27, § 25 (Supp. 1973); ARIZ. REV. STAT. § 13-842.01(e) (Supp. 1976); CAL. PENAL CODE § 11162 (West Supp. 1976); CONN. GEN. STAT. ANN. § 17-38a(c) (West Supp. 1976); DEL. CODE tit. 16, § 908 (1975); FLA. STAT. ANN. § 827.07(11) (1976); IND. CODE ANN. § 12-3-4.1-2(b) (Burns 1971); KAN. STAT. § 38-720 (Supp. 1975); KY. REV. STAT. § 199.990(7) (Baldwin 1976); LA. REV. STAT. § 14-430A(I) (West Supp. 1976); ME. REV. STAT. tit. 22, § 3857 (Supp. 1975); MINN. STAT. ANN. § 626.556(6) (West Supp. 1976); MO. ANN. STAT. § 210.165 (Vernon Supp. 1976); NEB. REV. STAT. § 28-1508 (1975); NEV. REV. STAT. § 200.507 (1975); N.H. REV. STAT. ANN. § 169:45 (Supp. 1975); N.J. STAT. ANN. § 9:6-8.14 (West 1976); N.M. STAT. ANN. § 13-14-14.1 (Supp. 1975); N.D. CENT. CODE § 50-25.1-13 (Supp. 1975); OHIO REV. CODE ANN. tit. 11, § 2151.99(c) (Page Supp. 1976); OKLA. STAT. ANN. tit. 21, § 848 (West Supp. 1975); PA. STAT. ANN. tit. 11, § 2212 (Purdon 1976); S.C. CODE § 20-310.5 (Supp. 1976); S.D. COMPILED LAWS ANN. § 26-10-13 (Supp. 1976); TENN. CODE ANN. § 37.1211 (Supp. 1975); TEX. FAM. CODE tit. 2, § 34.07 (Vernon 1976); UTAH CODE ANN. § 55-16-6 (Supp. 1975); VT. STAT. ANN. tit. 13, § 1353(d) (Supp. 1976); VA. CODE § 63.1-248.6 (Supp. 1976); WASH. REV. CODE ANN. § 26.44.080 (Supp. 1975); and WIS. STAT. ANN. § 48.981(3) (West Supp. 1975).

111. RESTATEMENT (SECOND) OF TORTS § 286. comment d. ALASKA STAT. §§ 47.17.010 - 17.070 (1975); D.C. CODE §§ 2-161 to 166 (1973); GA. CODE ANN. § 74-111 (Supp. 1976); HAWAII REV. STAT. §§ 350-1 to 5 (Supp. 1975); IDAHO CODE §§ 16-1601 to -1629 (1976); ILL. ANN. STAT. ch. 23, §§ 2051 - 2061 (Smith-Hurd Supp. 1976); MD. ANN. CODE art. 27 §§ 35A(a) (1976); MASS. ANN. LAWS ch. 119, §§ 51A - G (Michie/Law Co-op Supp.) (1976); MISS. CODE ANN. § 43-21-11(d) (Supp. 1976); N.C. GEN. STAT. §§ 110-115 to -122 (Supp. 1975); N.D. CENT. CODE §§ 50-25.1-01 to -14 (Supp. 1975); R.I. GEN. LAWS §§ 40-11-1.1 to 11-10 (Supp. 1975); VA. CODE §§ 63.1-248.2 to -248.6 (Supp. 1976); W. VA. CODE §§ 49-6A-1 to 6A-4 (1974); WYO. STAT. §§ 14-28.7 to 28.13 (Supp. 1976).

112. *See, e.g.*, Hansen, *Child Abuse Legislation and the Interdisciplinary Approach*, 52 A.B.A.J. 734, 735 (1966).

abuse, for without accurate reporting, the depth of the problem, as well as individual acts of abuse, may remain unknown. However, the mere reporting of child abuse offers no protection to children. Follow-up investigation and appropriate protective action by the legal and social welfare agencies receiving the report are also necessary. A remarkable 1972 report by the Select Committee on Child Abuse of the New York State Assembly "found a pervasive inability on the part of child care agencies to respond both programmatically and administratively to the needs of the children they are meant to serve."[113] The Select Committee also found "that New York State has an expensive, mismanaged or unmanageable child welfare system. . . ."[114] Imposing liability on the physician for the failure to report is especially onerous if the agency which would have received his report, would have failed to respond.

Even if a child abuse report is properly investigated, the legal and social welfare system of protecting children is wholly inadequate and ineffective.[115] If a parent who abuses his children is brought to court, the judge has basically two choices: either remove the child from the parent's custody, or warn, order and implore the parent to stop abusing his child.[116] These cases normally are handled by juvenile courts, which are underfinanced, over-burdened and without access to auxilary services needed to help both parent and child.[117] Moreover, it may be that society's widespread faith in techniques of modern science to rehabilitate troubled families and improve the condition of neglected and abused children is misplaced.[118]

Nevertheless, only a child abuse report can bring this complex legal and social machinery into action. One commentator has said, "[t]he most advantageous technique is to make contact with the abusive parent as soon as possible, before the child has been seriously abused. . . .The mandatory reporting of suspected child abuse statutes provides [*sic*] an excellent vehicle for accomplishing this."[119] Without reporting laws, more children will suffer regular

113. REPORT, *supra* note 5, at 5.

114. *Id.*

115. V. DeFrancis, *The Status of Child Protective Services*, HELPING THE BATTERED CHILD AND HIS FAMILY 127 (Kempe & Helfer eds. 1972). *See generally*, REPORT, *supra* note 5.

116. REPORT, *supra* note 5, at 134.

117. *Id.* at 136.

118. Burt, *Forcing Protection on Children and Their Parents; The Impact of Wyman v. James*, 69 MICH. L. REV. 1259, 1278 (1971); Mnookin, *Foster Care—In Whose Best Interest?* 43 HARV. ED. REV. 599 (1973).

119. Fraser, *supra* note 3, at 122.

and repeated abuse, which will eventually lead to permanent injury and death. While much needs to be done to improve the handling of child abuse reports, from the initial telephone call by a doctor to the final disposition of parental rights, reporting laws do provide some significant protection to children which the courts ought to recognize as a matter of public policy.

b. The Legal Question

The basic legal question for the court to consider in deciding whether to adopt the statutory duty to report child abuse in a medical malpractice action was first raised in 1914 by a Harvard law professor.[120] The argument was later put into these words: "[F]undamental principles of negligence do not require the doing of affirmative acts . . . and . . . it is unwise to extend the law of torts automatically merely because the legislature has seen fit to extend criminal liability for nonperformance of affirmative acts."[121] Few cases have adopted this view.[122] Others have taken the opposing view that only legislative affirmative duties automatically extend the law of torts.[123] Most authorities draw no distinction between mandatory and prohibitive statutes.[124]

The real basis of objection to the adoption of a statutory duty to report is the common law's reluctance to recognize any affirmative duties. This attitude has significantly weakened over the years.[125] It could be argued that the reporting laws merely regulate the conduct of persons already under an affirmative common law duty to report, given the strength of legal arguments discussed earlier.[125] The California Supreme Court in *Landeros* avoided the duty to report issue

120. Thayer, *supra* note 50.

121. Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 467 (1933).

122. Flynn v. Canton, 40 Md. 312 (1874); Ludke v. Burck, 160 Wis. 440, 152 N.W. 190 (1915); Taylor v. Lake Shore & M.S. Ry. Co., 45 Mich. 74, 7 N.W. 728 (1881); Southern Ry. Co. v. Sewell, 18 Ga. App. 544, 90 S.E. 94 (1916). *See also* Note, 13 Calif. L. Rev. 428, 431 (1929).

123. Baer v. Schaap, 168 Neb. 578, 97 N.W.2d 207, *reheard* 171 Neb. 347, 106 N.W.2d 468, *appeal dismissed* 172 Neb. 414, 109 N.W.2d 724 (1961).

124. Morris, *supra* note 121, at 467; Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 367 n.13 (1932); Note, *The Use of Criminal Statutes in the Creation of New Torts*, 48 COLUM. L. REV. 456, 458 (1948).

125. F. HARPER, *supra* note 50, at 1049. *See* notes 53, 55, 99-102 & accompanying text *supra*.

altogether[126] but the court of appeal carefully weighed these arguments and concluded:

> The duty to report is prescribed by the statute itself and the incident to be reported is not a fuzzy conglomerate of clinical symptoms making up the battered child syndrome but observable external injury or injuries which are properly recognizable through the expertise of a physician. In this situation the imposition of a duty to report cannot be said to be unreasonable or unjustifiably onerous.[127]

Perhaps of greater significance than whether a court will adopt a statutory duty to report child abuse is how the court will define that duty as suggested by the court of appeal ruling.

IV. Defining The Statutory Duty To Report

The imposition of civil liability based on the violation of a statute requiring affirmative action presents peculiar practical problems in defining the standard of duty, determining when the duty attaches, and pinpointing who has the duty. This means closely examining the requirements of the particular statute under which liability is sought. The state legislatures have produced mandatory reporting laws which display a great many significant differences. It should be noted that few cases of an actual criminal or civil proceeding have been reported anywhere in the United States which would give some definition to the specific language used in reporting laws.[128]

The first reporting laws, although not specifically aimed at child abuse, required reporting of any non-accidental injury.[129] Most state laws now define child abuse as any non-accidental or serious injury.[130] Several states have broadened the definition to include neg-

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126. 17 Cal. 3d at 412, 131 Rptr. at 76, 551 P.2d at 396. Cal. Evid. Code § 669 (West 1972) may preclude consideration of public policy and legal issues in the adoption of statutory requirements.

127. 123 Cal. Rptr. at 720, 721.

128. *See* cases cited note 85 *supra*; Fabritz v. Maryland, 5 Md. App. 708, 332 A.2d 324 (1975).

129. *See, e.g.*, Mich. Comp. Laws Ann. § 750.411 (1968) which was adopted in 1931.

130. Alaska Stat. § 47.17.070 (1975); Cal. Penal Code § 11161 (West Supp. 1976); Del. Code Ann. tit. 16, § 902 (1975); D.C. Code § 2-162 (1973); Ga. Code Ann. § 74-111(a) (Supp. 1976); Ind. Stat. Ann. § 12-3-4.1-2(a) (Burns 1973); Md. Ann. Code art. 27, § 35A(b)(7) (1976), Mass Ann. Laws ch. 119, § 51A (Michie/Law Co-op Supp. 1976); Mont. Rev. Codes Ann. § 10-1301(2)(a) (Supp. 1975); Neb. Rev. Stat. § 28-1501 (1975); Nev. Rev. Stat. § 200.501(1) (1975); N.H. Rev. Stat. Ann. § 169:38(I) (Supp. 1975); N.J. Stat. Ann. § 9:6-8.9 (West 1976); N.M. Stat. Ann. § 13-14-14.1(A) (1976); Pa. Stat. Ann. tit. 11, § 2203 (Purdon Supp. 1976); Tenn. Code Ann. § 37.1203 (Supp. 1975); Va. Code § 63-1-248.2(A) (Supp. 1976); W. Va. Code § 49-6A-2 (1974); Wis. Stat. Ann. § 48.981(1) (Supp. 1975).

lect.[131] Some have even gone so far as to include neglect of medical, educational, nutritional and clothing needs.[132] Statutes giving a broad definition to child abuse have the advantage of flexibility,[133] but the disadvantage of failing to provide adequate guidelines to those whose liability depends on their interpretation.[134]

When a physician examines a child whose condition comes under the reporting laws, there is little agreement in the statutes on what state of mind is required before the doctor is required to make a report.[135] The supreme court in *Landeros* acknowledges that "[t]he provision of section 11161.5 is ambiguous with respect to the required state of mind of the physician."[136] The court adopted reasoning suggested by a law review article: "[T]he more reasonable interpretation of the statutory language is that no physician can be convicted unless it is shown that it actually appeared to him that the injuries were *inflicted* upon the child."[137] The underlying issue here is whether the statute imposes an objective or subjective test of the physician's state of mind. This is a critical issue as illustrated by the vigorous dispute in *Landeros* because a subjective test would require proof of willful misconduct while an objective test would require proof only of negligent conduct by the doctor.[138] State laws

131. ARIZ. REV. STAT. ANN. § 13-842.01(a) (Supp. 1976); COLO. REV. STAT. ANN. § 19-10-103(1) (Supp. 1975); CONN. GEN. STAT. ANN. § 17-38a(b) (West Supp. 1976); FLA. STAT. ANN. § 827.07 (1)(b) (West Supp. 1976); HAWAII REV. STAT. § 350-1 (Supp. 1975); KAN. STAT. ANN. § 38-722 (Supp. 1975); KY. REV. STAT. ANN. § 199.335(2) (Baldwin Supp. 1976); LA. REV. STAT. § 14-403(b)(3)&(4) (West Supp. 1976); MO. ANN. STAT. § 210.110(1)(1)&(5) (Vernon Supp. 1976); N.C. GEN. STAT. § 110-117(1)&(4) (Supp. 1975); OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1975); S.C. CODE § 20-310.1(a) (Supp. 1976); S.D. COMPILED LAWS ANN. § 26-10-10 (Supp. 1976); UTAH CODE ANN. § 55-16-1.5(1)&(2) (Supp. 1975); VT. STAT. ANN. tit. 13, § 1352(2)&(3) (Supp. 1976); WASH. REV. CODE § 726.44.030(1) (Supp. 1975).

132. ARK. REV. STAT. § 42-807(c) (Supp. 1976); MICH. COMP. LAWS ANN. § 722.622(c) (Supp. 1976). MISS. CODE ANN. § 43-21-11(d) (Supp. 1973) requires reporting of battered children. R.I. GEN. LAWS § 40-11-3 (Supp. 1975) requires reporting of the battered child syndrome. IDAHO CODE § 16-1602(a) (1976) and WYO. STAT. § 14-28:7 (Supp. 1976) have adopted a medical definition substantially the same as the battered child syndrome. ALA. CODE tit. 27, § 21 (Supp. 1973) and TEX. FAM. CODE tit. 2, § 34.01 (Vernon Supp. 1976) require reporting of various specific physical, mental and sexual injuries.

133. The lack of appellate litigation over interpretation of child abuse reporting laws suggests that there is no practical need for flexibility.

134. Fraser, *supra* note 3, at 107.

135. Sussman, *supra* note 6, at 276, 277.

136. 17 Cal. 3d at 415, 131 Cal. Rptr. at 77, 551 P.2d at 397.

137. Note, *The California Legislative Approach to Problems of Willful Child Abuse*, 54 CALIF. L. REV. 1805, 1814 (1966) (emphasis added).

138. 17 Cal. 3d at 414, 131 Cal. Rptr. at 77, 551 P.2d at 397; *See also* 123 Cal. Rptr. at 725 n.11. In both civil and criminal cases the defendant has the constitutional right not to testify against himself. Defendant can invoke his right against self-incrimination by refusing

which use the phrase "reasonable cause to suspect"[139] or "believes or has reason to believe"[140] impose an objective standard—a reasonably prudent physician similarly situated would have suspected and reported the abused child. State laws which refer only to injuries which "appears to have been inflicted upon such minor by other than accidental means"[141] impose a subjective standard—no obligation to report arises thereunder unless the physician himself concludes that the child was a victim of abuse.

An additional complicating factor in defining the standard of duty is the wording of the penalty clause. The New York, Iowa, Arkansas and Colorado statutes each require proof of willful misconduct.[142] In a civil action, this is usually defined to mean "that the actor has intentionally done an act (or omission) of an unreasonable character in disregard of a risk known to him or so obvious that he must have been aware of it, and so great as to make it highly probable that harm would follow."[143] It is unclear whether liability in the 31 states which have criminal penalty clauses[144] would similarly require proof of a willful violation. The issue was not raised in *Landeros* even though the California penalty clause leaves this decisive issue open to question.[145] If willful misconduct is an element of the crime, then proof of willful misconduct would be necessary in a civil action under the statute.[146] Courts in the 14 states which im-

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to answer questions relating to a violation of a criminal statute. Requiring proof of willful misconduct in a civil action for failing to report child abuse puts a tremendous burden on the plaintiff if he must conduct his case without testimony from the defendant.

139. *See, e.g.*, N.Y. Soc. Serv. Law § 413 (McKinney 1976).

140. *See, e.g.*, Iowa Code Ann. § 235A.3(1)(a) (West Supp. 1976). The vast majority of states generally follow either New York or Iowa.

141. Ariz. Rev. Stat. Ann. § 13.842.01(a) (Supp. 1976); Cal. Penal Code § 11161.5 (West Supp. 1976). An argument can be made that Alabama falls into both categories. Ala. Code tit. 27, § 21 (Supp. 1973). The statute uses the phrases "appears" and "raise a suspicion" depending on the nature of the injury inflicted.

142. Ark. Stat. Ann. § 42-816(b) (Supp. 1976); Colo. Rev. Stat. Ann. § 19-10-104(4)(b) (Supp. 1975); Iowa Code Ann. § 235A.9(2) (West Supp. 1976); N.Y. Soc. Serv. Law § 420(2) (McKinney 1976).

143. Prosser, *supra* note 52, at 185.

144. *See* statutes cited note 110 *supra*.

145. Cal. Penal Code § 11162 (West Supp. 1976).

146. 17 Cal. 3d at 415, 131 Cal. Rptr. at 77, 551 P.2d at 297. *See generally* Note, *Privileged Communications—Abrogation of the Physician-Patient Privilege to Protect the Battered Child*, 15 DePaul L. Rev. 453, 459 (1966); *See also* Sussman, *supra* note 6, at 296. The burden of proving a statutory violation in a civil action is by a preponderance of the evidence. Sundquist v. Hardward Mut. Fire Ins., 371 Ill. 360, 21 N.E.2d 297 (1939); Grella v. Lewis Wharf, 211 Mass. 54, 97 N.E. 745 (1912); Ziegler v. Hutisford Farm. Mut. Ins., 238 Wis. 238, 298 N.E. 610 (1941); Galloway v. United Rd., 51 Cal. App. 575, 197 P. 663 (1921).

pose neither civil nor criminal liability for violation of their reporting laws[147] probably would not impose liability for damages absent a showing of willful misconduct, especially since the court would be acting without any support from the legislature.[148] The reasoning here is more practical than legal. A court in one of these states probably would not consider imposing civil liability absent an impressive showing by the plaintiff that the defendant personally was aware of the abuse and deliberately chose not to report.

Unusually difficult problems are created by some reporting laws in pinpointing the responsibility for making the report. The California Supreme Court was forced into some legal gymnastics over just such a question in *Landeros.* Most states have enacted what has become known as a gunshot statute—requiring hospitals, pharmacies, doctors and druggists to report all persons suffering injuries as the result of some criminal assault.[149] It becomes readily apparent that, when a child's injuries are the result of a criminal assault, both the gunshot statute and the child abuse reporting law are applicable.[150] In most states, the specific law can override the general law only when the two are inconsistent and irreconcilable.[151] This special problem may cause conflicts in some states depending on specific wording and court interpretation. In other states, these gunshot laws may give the plaintiff's counsel a statutory-based cause of action against the hospital as in *Landeros.*[152]

Arkansas's law contains the typical requirement that when a person required to report is a member of the staff of a hospital or school, that person must report the abused child to the chief administrator, who then has the duty to make a report.[153] Besides confusing legal responsibility for making a child abuse report, laws such as these

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Two criminal penalty clauses require special mention. ME. REV. STAT. ANN. tit. 22, § 3857 (Supp. 1975) incredibly makes the *conviction* of the abuser a *condition precedent* to prosecution of the non-reporter. N.M. STAT. ANN. § 13-14-14.1 (1976) runs the gamut from *strict liability* to negligence to willful misconduct by allowing prosecution for "failing, neglecting or refusing" to report a suspected child abuse case.

147. See statutes cited note 111 *supra.*

148. RESTATEMENT (SECOND) OF TORTS 286, comment d. *See* U.S. v. Constantine, 296 U.S. 287, 297 (1935) (Cardozo, J., dissenting).

149. *See, e.g.*, CAL. PENAL CODE § 11160 (West Supp. 1976); MICH. COMP. LAWS ANN. § 750.411 (1970). Despite diligent searching no cases have been found wherein civil or criminal liability has been imposed or has sought to be imposed under any of these laws anywhere in the United States.

150. Kohlman, *supra* note 6, at 184-85.

151. 17 Cal. 3d at 414, 131 Cal. Rptr. at 77, 551 P.2d at 297.

152. Kohlman, *supra* note 6, at 184-85.

153. ARK. STAT. ANN. § 42-808 (Supp. 1975).

present traps to the unwary plaintiff's attorney.[154] The draft Model Child Protective Services Act attempts to remedy this situation by requiring the same procedure but adding that "nothing in this section or Act is intended to relieve individuals of their obligation to report on their own behalf, unless a report already has been made or will be made forthwith."[155] That still doesn't seem very workable. Michigan's new law better handles the situation by simply requiring the person making a report to notify the chief administrator.[156] This approach clearly establishes legal responsibility for making the child abuse report while recognizing the need for administrative accountability.

V. Statutory Negligence For Failing To Report Child Abuse

A statutory negligence action for the failure to report child abuse is very similar to an action for medical malpractice using the statutory duty to report. There are, however, several significant differences. It has been argued that a statutory negligence action asks the court to recognize a new cause of action for civil damages.[157] These arguments probably stem from the federal court decisions which approach statutory actions directly compared to state courts. The federal courts have adopted a theory of implied remedies, imposing civil liability by *inference* to federal criminal laws.[158] On the other hand, state courts find a damage remedy by *analogy* to the criminal statute.[159] While federal court theory seems better defined, clearly the fundamental question in either state or federal court is whether the legislature intended to raise the possibility of civil liability in a criminal enactment, which neither specifically denies nor approves of the extension.[160] State courts considering a statutory negligence action for the failure to report child abuse will approach this problem with the same public policy and legal questions in mind they raise when asked to adopt the statutory duty to report a medical

154. Who does the plaintiff file suit against, for example, the teacher or the principal? The teacher could claim he fulfilled his duty by notifying the principal that he suspected a child of being abused by his parents. The principal could deny receiving any such notice. The resulting problems of proof put a heavy burden on the plaintiff.

155. *Model Act*, *supra* note 19, tit. II, § 5(b) & comment.

156. Mich. Comp. Laws Ann. § 722.623 (Supp. 1976).

157. Note, *supra* note 124, at 456.

158. *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975).

159. *See, e.g.*, Rudes v. Gottschalk, 159 Tex. 552, 324 S.W.2d 201 (1959).

160. Prosser, *supra* note 52, at 191, 192.

malpractice action.[161]

However, mandatory reporting laws require a long list of persons to report child abuse victims who come to their attention. While the earliest statutory forms included only doctors,[162] today many states require dentists, chiropractors, osteopaths, podiatrists, optometrists, religious practioners, nurses, hospital personnel, teachers, counselors, school principals, social workers, police officers, day care, foster care and institutional workers to report suspected cases of child abuse.[163] A few states require *everyone* who has reason to believe that a case of child abuse exists to report.[164] The statutory duty to report makes all of these persons vulnerable to a statutory negligence action. The California court of appeal shuddered at this possibility: "We profoundly believe that the possible extension of civil liability to these persons for mere failure to report would raise serious questions of fairness and would subject the statute to a constitutional challenge for unreasonableness, uncertainty and vagueness."[165] Michigan and four other states, by enacting a specific civil liability provision subjecting all required reporters (not just doctors) to civil liability for the failure to report, demonstrated that they take a different view.[166] The impact of spreading liability for the failure to report child abuse to so large a group, however, may deter state court acceptance of the statutory negligence theory.[167]

VI. Liability Per Se

In Michigan, New York, Iowa, Colorado and Arkansas, legislators have imposed liability per se for the violation of mandatory reporting laws.[168] The plaintiff's case in Michigan is the easiest because the legislature has adopted an objective test of liability requiring that the defendant only *negligently* fail to report.[169] New York, Iowa,

161. *See* notes 113-25 & accompanying text *supra*.

162. Fraser, *supra* note 3, at 108.

163. *Id.* at 109-10.

164. La. Rev. Stat. § 14-403(c)(1) (West 1974); Tenn. Code Ann. § 37-1202 (Cum. Supp. 1976). *See also* Sussman, *supra* note 6, at 274.

165. 123 Cal. Rptr. at 725.

166. See notes 13-17 *supra*.

167. See notes 79, 80 & accompanying text *supra*.

168. See notes 13-17 *supra*.

169. Michigan's civil liability clause, Mich. Comp. Laws Ann. § 722.633(1) (Supp. 1976) must be read together with the reporting clause, Mich. Comp. Laws Ann. § 722.623(1) (Supp. 1976). A person is required to report in Michigan when he has reasonable cause to suspect child abuse or neglect, which requires the court to apply an objective test, imposing liability for a negligent failure to report.

Colorado and Arkansas each require proof of willful misconduct, making the plaintiff's case more difficult.[170] Comments to the draft Model Child Protective Services Act, which uses language similar to the provisions adopted in New York, Iowa, Colorado and Arkansas, lists three requirements for a violation imposing civil liability: "To be liable under this section . . . a person required to report or act must suspect that a child is abused or neglected, must know about his obligation under the reporting law, and must intentionally fail to fulfill them."[171] Requiring proof of willful misconduct conflicts with the express purpose of reporting laws adopted in these four states. Their reporting laws require the reporting of all *suspected* child abuse and neglect cases.[172] That means the law does not require the exercise of any skill or diligence, which would argue against penalizing a mere negligent failure to report. Secondly, the reporting requirement is based upon an objective standard of reasonable cause to suspect, which is in direct conflict with the subjective standard of willful misconduct.

It seems obvious that New York, Iowa, Arkansas and Colorado have adopted civil liability clauses requiring proof of willful misconduct as a specification and limitation on the situations in which liability might arise.[173] In Michigan, however, the civil liability provision opens wide the door of liability. This seems strange because the legislature repealed a criminal liability clause for the failure to report which had been on the books since the law's first enactment in 1964.[174] It seems unlikely courts in Michigan would determine that a higher measure of proof is necessary based on a construed legislative intent[175] or legal precedent.[176]

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170. See statutes cited note 142 *supra*.

171. *Model Act*, *supra* note 19, tit. II, § 12, comment.

172. ARK. STAT. ANN. § 42-808 (Supp. 1975); COLO. REV. STAT. § 19-10-104 (Cum. Supp. 1975); IOWA CODE ANN. § 235A.3(1) (West Supp. 1976); N.Y. SOC. SERV. LAW § 413 (McKinney 1976).

173. *Model Act*, *supra* note 19, tit. II § 12, comment. Douglas Besharov, executive director of the National Center for Child Abuse and Neglect, which prepared the Model Act, was executive director of the N.Y. State Assembly, Select Committee on Child Abuse, which drafted the first civil liability clause. *See* REPORT, *supra* note 5.

174. MICH. COMP. LAWS ANN. § 722.575 (1968), repealed by MICH. COMP. LAWS ANN. § 722.625 (Supp. 1976).

175. The title clause of the Michigan Child Protection Law, MICH. COMP. LAWS ANN. §§ 722.621 - .636 (Supp. 1976) contains the following clauses: "An act to require the reporting of child abuse and neglect by certain persons. . .to safeguard and enhance the welfare of children and preserve family life. . .to prescribe penalties. . . ." These provide no support for a court construction requiring more than a negligent failure to report in a civil liability

Special attention should be given the fact that Michigan, New York, Colorado and Arkansas, all impose civil liability for the failure to report child neglect.[177] All four states define neglect to include the failure to provide adequate food, clothing, shelter or medical care.[178] Neglect requiring reporting remains an extremely difficult subject to define accurately, raising the possibility of prejudice in reporting based on class, culture, race or even the moral viewpoint of the reporter. All of the implications of requiring reporting of neglect have not been fully considered.[179] Requiring reports of child neglect also raises the possibility of injury to the child and family in the investigation of reports, storage of reports and eventual action by authorities.[180]

The investigation of reports means a potentially threatening invasion of family privacy. The storage of reports in a central registry[181] means possible undue and unfair stigma on both the alleged abusers and the child. The broad definitions given to child neglect tend to legitimatize obtrusive protective and corrective action by state authorities. While the reporting of battered children, starving children, and sexually assaulted children ought to be encouraged by civil liability laws, there are too many unanswered questions about reporting of *neglected* children for either criminal or civil enforcement of laws requiring neglect reporting.[182] This seems especially true because the financial, administrative and social ability of state agencies to respond to reports of abused children remains a major problem.[183]

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case. Repeal of the criminal penalty clause, *see* note 174 *supra*, removes any argument that a criminal penalty clause requires a showing of willful misconduct. *See* notes 142-48 *supra*.

176. The striking similarities between misprison of a felony and failing to report child abuse may provide an argument for willful misconduct. *See* notes 46-49 & accompanying text *supra*. However, it seems unlikely the courts could adopt such reasoning in the face of specific legislation requiring only a negligent failure to report. *But see* People v. Garnett, 129 Cal. 364, 61 P. 1114 (1900) and State v. Michaud, 150 Me. 479, 114 A.2d 352 (1955), where the courts construed misprison statutes as requiring affirmative concealment, despite contrary legislative language.

177. ARK. STAT. ANN. § 42-808 (Supp. 1975); COLO. REV. STAT. § 19-10-104(4)(B) (Supp. 1975); IOWA CODE ANN. § 235A.(a)(1) (West Supp.1976); MICH. COMP. LAWS ANN. § 722.633(1) (Supp. 1976); N.Y. SOC. SERV. LAW § 420 (MCKINNEY 1976).

178. ARK. STAT. ANN. § 42-807(c) (Supp. 1975); COLO. REV. STAT. 19-10-103(1)(a)(III) (Supp. 1975); MICH. COMP. LAWS ANN. 722.622(c) (Supp. 1976); N.Y. SOC. SERV. LAW § 412(2)(a) (McKinney 1976).

179. Sussman, *supra* note 6, at 311-12.

180. *Id.*

181. *See generally* REPORT, *supra* note 5, at 41-47; Model Act, *supra* note 19, at tit. IV, § 21.

182. Sussman, *supra* note 6, at 311-12.

183. *See* notes 115-17 & accompanying text *supra*.

VII. Proximate Cause

The proximate cause problem raised by this type of case is complex. In both the California court of appeal and the supreme court in *Landeros*, the defendants rested most of their defense on arguments that the parents of the child inflicted the injuries not the doctors.[184] The plaintiff argued that the action of the parents was reasonably foreseeable by an ordinarily prudent physician, and, therefore, did not relieve him of liability.[185] Both the court of appeals and the supreme court ruled that the issue of proximate cause was a question of fact for the judge or jury to decide from the testimony at the trial.[186] Most states follow the rule that an actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening criminal act of a third party, if the intervening act was reasonably foreseeable at the time of his negligent conduct.[187]

Both the court of appeal and the supreme court in *Landeros* were impressed by the opinion expressed in professional literature that one of the distinguishing characteristics of the battered child syndrome is that it "is not an isolated, atypical event but part of an environmental mosaic of repeated beatings and abuse that will not only continue but will become more severe unless there is appropriate medicolegal intervention."[188] A principle reason why the doctor's failure to report is negligence is the likelihood that the child will suffer further injury.[189] The very reason for reporting laws is to find abused children and prevent injury to them. This would seem to suggest that proximate cause problems will tend to divide themselves into two groups as in the discussion of the duty to diagnose.[190] The foreseeability of further abuse may be apparent in the case of the battered child syndrome, starvation, knife or gunshot wounds

184. *See* note 71 & accompanying text *supra*.

185. Brief for Plaintiff, *supra* note 64, at 38, *citing* Ross v. Hartman, 139 F.2d 149 (D.C. Cir. 1943); Janof v. Newsom, 53 F.2d 149 (D.C. Cir. 1931); Vasely v. Sager, 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P.2d 151 (1971).

186. 17 Cal. 3d 411, 131 Cal. Rptr. 75, 551 P.2d 395; 123 Cal. Rptr. at 723.

187. *See generally* Prosser, *supra* note 52, at 272-89. *See also* Williams v. U.S., 352 F.2d 477 (5th Cir. 1965); Davis v. Thornton, 384 Mich. 138, 180 N.W.2d 11 (1970); Barry v. Visser, 354 Mich. 38, 92 N.W.2d 1 (1958); Sexton v. American Aggregates, 60 Mich. App. 524, 231 N.W.2d 449 (1975).

188. 17 Cal. 3d at 412, 131 Cal. Rptr. at 75 & n.9, 551 P.2d at 395 & n.9; 123 Cal. Rptr. at 721-23 & n.9.

189. Restatement (Second) of Torts § 449. *See also* Crowther v. Ross Chem. Co., 42 Mich. App. 426, 431-33, 202 N.W.2d 577, 580-81 (1975).

190. *See* notes 82-84 & accompanying text *supra*.

and sexual assault. But the simple assault, maltreatment or neglect case probably does not suggest the likelihood of further injury. It appears that the duty to diagnose and the proximate cause issue of foreseeability both will depend on expert testimony presenting a question of fact for the judge or jury to decide.[191]

Child abuse negligence actions suggest two more proximate cause questions. In *Landeros,* fully two months elapsed between the alleged negligence of the examining doctor and hospital, and the subsequent assault on the child by her parents. There must be some point at which liability ends. The foreseeable injury probably occurs within some reasonably short period of time but the question remains in the province of the trier of fact.[192] The second issue is more troublesome. Experts are concerned about the possible danger to other children in the household after an abused child is removed.[193] The abuse of one child may imply the mistreatment of his brothers and sisters. In one case, a New York Family Court judge removed two siblings of an abused child from the care of their mother.[194] The judge relied on a statutory "imminent danger" doctrine.[195] Assuming that a duty to siblings can be established under this reasoning, it is likely that an argument on foreseeability of injury to siblings would present a fact question for the judge or jury.

VIII. Reporting Laws And Due Process

A strong argument was made by the court of appeal in *Landeros* that potential liability based on an objective standard of duty would impose "an intolerable and unfair burden upon those persons described in the reporting law."[196] The court of appeal also argued that extension of liability to "school teachers, social workers, administrators of summer day camps, etc." would raise serious questions of fairness and would subject the statute to a constitutional due process challenge.[197] There is no compulsion that a court adopt a faulty reporting law as the standard of duty in a medical malpractice or

191. *Id.* See note 186 *supra.*

192. Prosser, *supra* note 52, at 289. Restatement (Second) of Torts §§ 452(1), 452(2): The fact that others may have incurred the duty to report the same injuries during this lapse of time does not affect liability for the principal actor.

193. Comment, *Abused Children: Problems & Proposals,* 8 Duquesne L. Rev. 136, 148 (1969-70).

194. In Re. J., 71 Misc. 2d 47, 335 N.Y.S.2d 815 (Fam. Ct. Richmond Cty. 1972).

195. N.Y. Jud. Law § 1025(a) (McKinney 1976).

196. 123 Cal. Rptr. at 725.

197. *Id.*

statutory negligence cause of action unless the law specifically provides for civil liability.[198] It is the court's own decision which brings the reporting law's requirements into the civil case. Where the law is foolish, overly harsh or unworkable, the court should refuse to adopt it.[199] There is a long line of cases in which the courts have refused to accept clearly unreasonable criminal provisions as controlling in a civil action.[200] The Texas supreme court has said: "As the power of adopting or rejecting standards rests with civil courts, we may accept or reject the criminal statute or use such part thereof as may be deemed appropriate for our purposes."[201] Therefore, due process issues facing the court in a reporting law case are not clearly drawn. The border line between a reasonable rule and an unreasonable requirement is especially hazy in a civil action. Vagueness tests clearly may be used to strike down criminal statutes. But the courts are not receptive to vagueness attacks on statutes in civil negligence actions.[202]

Moreover, there is a long line of cases in which the courts have accepted, as a rule of conduct in a negligence action, the requirements of a statute, which was invalid or ineffective for its purpose as a criminal statute.[203] The quesion then, is not whether the reporting law is unreasonable or void-for-vagueness, but whether the reporting law "was at least sufficient as a remedial statute imposing a civil duty so as to render its violation negligence. . . ."[204] The *Landeros* court of appeal's argument that an objective standard imposes an intolerable and unfair burden simply is not convincing. The majority of reporting laws adopted in the United States specifically require an objective test of duty.[205] The conduct of physicians in most kinds of malpractice actions is measured by an objective

198. *See* notes 104-107 & accompanying text *supra*.

199. PROSSER, *supra* note 52, at 200.

200. Evison v. Chicago, 45 Minn. 370, 49 N.W. 6 (1891); Stevens v. Luther, 105 Neb. 184, 180 N.W. 87 (1920); Stafford v. Chippewa Valley Elec. Ry. Co., 110 Wis. 331, 85 N.W. 1036 (1901); Rodenkirch v. Nemich, 168 S.W.2d 977 (Miss. App. 1943); Sardo v. Herlihy, 143 Misc. 397, 256 N.Y. Supp. 690 (1932).

201. Rudes v. Gottschalk, 159 Tex. at 556, 324 S.W.2d at 205.

202. *See* Winters v. N.Y., 333 U.S. 507, 515 (1948); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 n.16 (1960).

203. Schultz v. Chicago, 57 Minn. 271, 59 N.W. 192 (1948); Ponca City v. Reed, 115 Okla. 166, 242 P. 164 (1925); Clinkscales v. Carter, 22 Cal. App. 2d 72, 136 P.2d 777 (1943); West Texas Coaches v. Madi, 25 S.W.2d 199 (Tex. App. 1930). *See also* Lambert v. California, 355 U.S. 225 (1957).

204. Solan & Billings v. Pasche, 153 S.W. 672, 674 (Texas Civ. App. 1913).

205. *See* note 140 *supra*.

standard.[206] Indeed, most negligence actions are based on the objective test of the reasonable man.[207]

Even the experts are split on whether non-physicians ought to be required to report their suspicions of child abuse.[208] Fundamentally, the court faces a difficult public policy decision. The reporting law simply asks that police and social welfare agencies be notified of suspected child abuse victims, not of fully diagnosed cases of the battered child syndrome.[209] The courts should examine the extension of liability to non-physicians on a case-by-case basis, focusing on the culpability of the failure to report rather than making blanket decisions as suggested by the California court of appeal in *Landeros.* The courts should closely examine the relationship between the child and the defendant. This would seem to be the key. A teacher may have a closer relationship with an abused child than a police officer, for example. The circumstances under which the defendant learned of the alleged abuse is of grave importance. A casual glance by the school physical education teacher may reveal more than a thorough examination by an optometrist. A blanket decision exculpating all non-physicians would ignore these decisive factors.

Conclusion

The California Supreme Court decision in *Landeros v. Flood* should prompt state legislators across the country to begin a complete overhaul of mandatory child abuse reporting laws. The decision exposes reporting laws as ineffective, unworkable and unwieldly, recognizes that reporting laws have been largely ignored since their adoption and, perhaps, most importantly, squarely poses the dilemma of enforcement. The draft Model Child Protective Services Act[210] prepared by the National Center for Child Abuse and Neglect of the U.S. Department of Health, Education and Welfare may become the standard text for legislators working on new reporting laws.[211]

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206. *See* note 81 *supra.*
207. Prosser, *supra* note 52, at 149-66.
208. Sussman, *supra* note 6, at 272-76.
209. *See* notes 172-73 & accompanying text *supra.*
210. *Model Act*, *supra* note 19.
211. Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. §§ 5101-5106 (Supp. 1976) & Child Abuse and Neglect Prevention & Treatment Project, 45 C.F.R. §§ 1340.1-1 to .3-8 (1976) require states seeking federal matching grants to substantially comply with the model act. *See, e.g.*, John T. Dempsey, Director of the Department of Social Serv-

The Model Act recommends adoption of civil and criminal liability provisions requiring proof of willful misconduct by violators.[212] Requiring proof of willful misconduct would limit successful civil actions to the most horrifying cases. Arkansas, Colorado, Iowa and New York already have enacted such a stiff specification and limitation on civil liability.[213] These cases would involve children, high-paid professionals and heavy liability insurance, suggesting the likelihood of very sympathetic jury verdicts for the plaintiff. Putting a reasonably heavy burden on the plaintiff would overcome this obvious problem.

Requiring proof of willful misconduct in a criminal action, however, puts too great a burden of proof on local prosecutors already eager to avoid pressing charges against violators.[214] The New Mexico legislature has adopted a criminal penalty clause which seems to impose strict liability for the failure to report suspected cases of child abuse.[215] This approach, at least, encourages prosecution of violators by increasing the likelihood of conviction in those few cases which might be brought. State legislators should recognize that the history of child abuse reporting laws indicates little chance that imposing strict liability for the failure to report would bring about mushrooming prosecution.[216]

Other enforcement mechanisms also should be explored by state legislators. The penalty for failing to report suspected child abuse for physicians might be a public reprimand, suspension or revocation of a state license to practice.[217] There may be many advantages to enforcing child abuse reporting laws at an administrative rather than civil or criminal levels. The Maine legislature has adopted a provision strictly forbidding licensing review for the failure to re-

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ices, Memorandum, Substitute House Bill 4214 Analysis, May 16, 1975, at 1: "Enactment is important so that Michigan will qualify for federal funds in the form of grants to states. . . ." *Quaere*, a more detailed investigation may reveal that all five states which have enacted civil liability clauses, see notes 13-17 *supra*, did so under federal pressure. *See* 45 C.F.R. § 5103(b)(2)(D) which requires federally funded states to demonstrate that mandatory child abuse reporting laws are being enforced. Given the lack of *public* prosecution, *see* notes 37-41 *supra*, the civil liability clause, which requires *private* enforcement action, may be the only way states can show compliance with the regulation.

212. *Model Act*, *supra* note 19, tit. II, § 12.

213. *See* note 172 & accompanying text *supra*.

214. *See* notes 40-41 & accompanying text *supra*.

215. N.M. STAT. ANN. § 13-14-14.1 (1976). *See* note 146 *supra*.

216. See notes 37-41 *supra*.

217. Daly, *Willful Child Abuse and State Reporting Statutes*, 23 U. MIAMI L. REV. 283, 335-36 (1969).

port.[218] However, other provisions of the Maine law indicate that the legislature opposes enforcement of the state's reporting law.[219]

The Model Act comments that "penalties for the failure to report or perform mandated services have been shown to be valuable and necessary components of an effective reporting law. Nevertheless, the main reason for underreporting [*sic*] remains ignorance and misunderstanding of the reporting law. . . ."[220] For this reason, the Model Act recommends adoption of a widespread and continuing public and professional education and training program.[221] This seems more realistic than approaches toughening civil, criminal or administrative penalties because mandatory child abuse reporting laws, more than anything else, serve merely to formalize the general moral obligation of aiding battered children.[222]

NEIL J. LEHTO

218. ME. REV. STAT. ANN. tit. 22, § 3857 (Supp. 1975).

219. *Id.* The penalty clause provides that conviction of the abuser is a condition precedent to prosecution of the non-reporter.

220. Model Act, *supra* note 19, tit. II, § 12, comment.

221. *Id.*

222. *See generally* Frankel, *supra* note 35, at 429.